In the Matter of Michael Gonsalves
DOP Docket No. 2003-1638
(Merit System Board, decided February 22, 2006)

The appeal of Michael Gonsalves, a Senior Correction Officer with the Juvenile Justice Commission (JJC), Department of Law and Public Safety, of his removal, effective October 1, 2002, on charges, was heard by Administrative Law Judge Caridad F. Rigo (ALJ), who rendered her initial decision on August 15, 2005, reversing the appellant's removal. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent review of the record, the Merit System Board (Board), at its meeting on February 22, 2006, did not accept and adopt the Findings of Fact and Conclusion as contained in the attached ALJ's decision or the recommendation to reverse the removal. Rather, the Board upheld the appellant's removal.

DISCUSSION

The appellant was removed from his position at the JJC's New Life Skills and Leadership Academy (Boot Camp), located in Tabernacle, New Jersey, effective October 1, 2002, on charges of conduct unbecoming a public employee; use, possession, or sale of any controlled dangerous substance; and violating the State's Drug Free Workplace Policy (Policy). Specifically, the appointing authority asserted that, pursuant to a random drug test on May 6, 2002, the appellant tested positive for Cannabinoids after ingesting marijuana. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

The record indicates that the appellant had been subjected to routine drug testing during his previous service as a security guard in the casino industry and during his four and one-half years of service in the U.S. Marine Corps, and that he had never failed any of those drug tests. Additionally, he was aware of the State's Policy and random drug testing program, and understood that testing positive for illicit drugs would be grounds for dismissal from State employment.

Pursuant to the State's Policy, on May 1, 2002, a computer-generated random drawing, conducted in the presence of union representatives, compiled a Master List for Donor Notification, on which the appellant's name appeared. After noting that the appellant was scheduled for a random drug test on May 6, 2002, per the Internal Affairs Drug Testing Schedule

(Schedule), Wimson Crespo, Assistant Chief of Internal Affairs with the JJC, notified the appellant that he had been selected. Crespo had the appellant sign and thumbprint a Donor Notification Form, which listed the appellant's name, Social Security number, and a brief summary of the JJC's Drug Testing Policy. Additionally, the Donor Form indicated that the appellant had the option of providing a second drug test sample, for possible retesting, which the appellant declined to do. On a Medication Information Form (Medication Form), signed and thumbprinted by the appellant and witnessed by Crespo, the appellant listed all of the prescription and over-the-counter (OTC) medications that he had taken within the last 30 days, including Xanax[1], Ambien (a sleep aid), Lisonepril (for hypertension), Ultimate Orange Supplement (an energy supplement), Nyquil, Advil, and painkillers whose names he could not remember (Carisoprodol and Ultram). The appellant indicated that he took each of these medications daily, as Crespo had advised him to do since he could not remember the exact frequency when he took each medication. The ALJ found that the prescriptions for Xanax, Ambien, and Lisonepril were all prescribed by the appellant's doctor, Dr. Reuben Crystal.[2] The appellant sealed his Medication Form in an envelope identified by his Social Security number. After washing his hands, the appellant opened a factory-sealed Sample Specimen Bottle (Specimen) and wrote his Social Security number, the date and time, and Crespo's name on a label in number 2 pencil[3], and placed the label inside the specimen bottle. Each specimen bottle is assigned a control number and the appellant's control number was Specimen #050254. The appellant proceeded with Crespo to a restroom to void urine into the bottle and afterwards sealed the bottle with the "tamper-proof" one-way locking security lid. However, the ALJ noted, "The lid has no accompanying adhesive tabs over which the submitting officer places his signature, or any other security devices that cannot be reproduced or transferred." Crespo and the appellant returned to the drug testing room, where both men signed the Continuity of Evidence Form (Evidence Form) for Specimen #050254, which Crespo had filled out with the appellant's name, Social Security number, the date and time, the location where the specimen was taken, and the urine's temperature of 91 degrees.[4] The appellant admitted that Crespo had properly used the JJC's Internal Affairs Unit Specimen Collection Summary Checklist, itemizing 21 steps in the State's drug testing process, in order to properly conduct the appellant's urinalysis, which the appellant signed as an affirmation that everything was done according to policy on May 6, 2002 at 2:11 p.m. in Crespo's presence.

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[1] Xanax is used to relieve anxiety, nervousness, and tension associated with anxiety disorders or panic disorders.

[2] However, the Board notes that the appellant admitted that he did not have a prescription for Ambien.

[3] The Board notes that Number 2 pencils are used in order not to contaminate the urine sample.

[4] The temperature indicates whether anything foreign has been put into the urine sample.

Afterwards, Crespo placed the Evidence Form, along with the Medication Form envelope and the appellant's specimen, in a storage case for transport to the Internal Affairs office at Bordentown. Upon his arrival, Crespo entered in the Internal Affairs Drug Testing Logbook (Logbook) that he had placed the appellant's specimen and forms in the locked refrigerator at 3:15 p.m., awaiting future transport to the Lab.[5]

Crespo stated that the Logbook and the Schedule are Internal Affairs office forms to assure that each officer on the Master List is tested, but that there is no State or JJC policy requirement to use these documents. However, the ALJ found that the Attorney General's Guidelines on Law Enforcement Drug Testing require that "drug testing records shall include *but not be limited* to . . . the chain of custody of the urine sample from the time it was collected until the time it was received by the State Toxicology Laboratory . . . for random drug testing" (emphasis supplied), and "the records **will** also include the following . . . list of those who were actually tested and the dates those officers were tested." (emphasis in original). When asked by the ALJ why the appellant's name appeared on two schedules, Crespo replied that investigators often switch testing assignments due to their other work requirements.

On May 8, 2002, Eric Cloud, a Senior Investigator with the JJC's Office of Investigations, removed a batch of urine specimens, including Specimen #050254, from the locked refrigerator for transportation to the State's Toxicology Lab (Lab). Before transporting the specimens, he matched the specimen control numbers and Social Security numbers on the specimens against the control numbers and Social Security numbers on the Specimen Submission Forms, the JJC's Internal Affairs Logbook, and the Continuity of Evidence Forms. Afterwards, Cloud signed the Continuity of Evidence Form, acknowledging the date and time that he had taken the specimens into his possession for transportation to the Lab. The ALJ found that "In order for [Cloud] to remove the sample from Bordentown, both [Cloud] and [Crespo] who entrusts the sample to [Cloud] must sign the Continuity of Evidence Form for each sample when it is removed," noting that Crespo did not sign the form. However, the Board notes that nowhere in State policies or guidelines does it require that both signatures are necessary when removing specimens from locked storage under State control. After arriving at the Lab on May 8, 2002 at 3:26 p.m., Cloud double-checked the Social Security numbers on the specimens against the Social Security numbers on the Specimen Submission Forms, which both Cloud and the Lab technician signed. Finally, the Lab technician assigned the appellant's specimen a Toxicology Control Number (TCN) of G-6910.

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[5] Specimens are transported from Bordentown to the Lab two to three times per week.

In addition to Crespo's failure to sign the appellant's continuity of evidence form, the ALJ found that Internal Affairs investigators "made numerous errors and repeatedly failed to follow procedural mandates regarding the paperwork for tracking the specimens." In this regard, she noted that a Specimen Submission Form dated May 8, 2002, listed several specimens documented by Senior Investigator Charles Kranz, which were not entered into the Internal Affairs Logbook. Another Specimen Submission Form dated May 3, 2002, listed specimens taken on May 3, 2002, and taken to the Lab on May 3, 2002, which were still entered into the logbook. Further, the Specimen Submission Form for Specimen #050251 indicates the specimen was taken on May 3, 2002. However, Specimen #050251 was logged in on May 6, 2002.[6] When asked about the discrepancy, Crespo replied that he had "obviously made a mistake in putting the wrong dates on this form." Even though Specimen #050251 was marked with different dates and times on the two Submission Forms, the Board notes that the forms indicate that the specimen was delivered to the Lab on the same date and both are in Crespo's writing.

Dr. Robert Havier, a Forensic Toxicologist and the Assistant Director of the State Toxicology Laboratory, where he has been employed for 27 years, described the procedures that are followed upon receipt of specimens for drug testing.[7] First, the specimen bottle is checked to ensure that the Social Security number on the specimen bottle matches the one that appears on the Specimen Submission Form. Next, the bottle is inspected for integrity, ensuring that it is sealed, and that there is no evidence of tampering. A special instrument is then used to cut the top off the specimen bottle, and a 500-milliliter sample is placed in a vial and into the screening instrument, which is called an axsym. Once placed in the axsym, the urine specimen is tested using Fluorescence Polarization Immuno Assay (FPIA) screening, which tests the specimen for the presence of eight drugs (Amphetamine-Methamphetamines, Barbiturates, Benzodiazepines, Cocaine, Cannabinoids, Methadone, Phencyclidine, and Opiates). The FPIA test on TCN G-6910 (the appellant's) revealed that the specimen was positive for Cannabinoids, indicating 111.85 nanograms per milliliter of the metabolite of Cannabinoids in his urine. Dr. Havier noted that any reading over 20 nanograms per milliliter for the metabolite of Cannabinoids is a positive reading; therefore, the appellant's results were more than five times the threshold level. Dr. Havier explained that a metabolite is what one's body changes a drug into. When an individual uses Cannabinoids, the body changes the pure parent drug into a metabolite, Carboxy-9-Delta THC. He stated that there is

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[6] It is noted that Specimen #050251 was <u>not</u> the appellant's specimen.

[7] The ALJ granted the appellant's motion to treat Dr. Havier's testimony concerning his interpretation of the drug test results as a fact witness, "because he is simply clarifying a fact, rather than expressing an opinion," and not as an expert in forensic toxicology.

nothing else that produces Carboxy-9-Delta THC, other than Cannabinoids. After the initial FPIA testing was complete, the appellant's specimen bottle was retrieved from the refrigerator and a portion of the urine was placed in a sterile test tube, with a Label indicating his TCN G-6910 and the indication "Cannabinoids." This specimen was then tested, using Gas Chromatography/Mass Spectrophotometry (GCMS). GCMS testing involves chemically extracting the "target drug," which in the appellant's case was Carboxy-9-Delta THC. GCMS testing on the appellant's specimen (TCN G-6910) resulted in a positive reading of 41 nanograms of Carboxy-9-Delta THC. Next, the Medical Review Officer determined that none of the medications listed on the appellant's Medication Form could account for the positive test results. Dr. Havier was asked to comment on a contention by Dr. Anthony Rezitis, a friend of the appellant, that the test results were a false positive due to prescribed medications that the appellant took and due to his frequently eating poppy seed bagels (Exhibit A-10). Dr. Havier stated that none of the appellant's medications interfered with the appellant testing positive for Cannabinoid metabolites and that "poppy seeds will not produce Carboxy-9-Delta THC." Dr. Havier also testified that Dr. Rezitis' claim that false positive results are commonly caused by many of the medications taken by the appellant in an Enzyme Multiplied Immunoassay Technique (EMIT) test, while true, had no bearing on the appellant's results, which were obtained through a different test. In this regard, Dr. Havier explained that the State Lab did not use the EMIT procedure, but the FPIA (Fluorescence Polarization Immuno Assay) test to screen the appellant's specimen for Cannabinoids. He further explained that the drugs listed on the appellant's Medication Form "do not interfere with our analytical procedures (the FPIA test)." Moreover, he stated that, "Poppy seeds will not produce the metabolite from marijuana." Finally, Dr. Havier concluded, "The amount and identity of that metabolite present in the [appellant's] urine specimen (Carboxy-9-Delta THC) conclusively proved that the [appellant] was exposed to the parent drug (marijuana)" (emphasis added).

Dr. Havier also testified regarding the type of sample bottle used. In this regard, he was asked to read from the New Jersey Drug Enforcement and Testing Policy, which states that, "In addition to the sealed container, all submissions must be packaged in a manner that includes two additional seals to provide for the integrity of the specimen." Dr. Havier explained that this language referred to the previous specimen bottles used for drug testing, which had screw-on-and-off caps, unlike the tamper-proof locking caps that are now used. Dr. Havier stated that, "Those (the previous bottles) could have been tampered with and that's why they required evidence tape to go around the perimeter of the cap and over the cap."

At a pre-hearing conference, the ALJ had stated that the issue before her was a simple one: "Did the appellant test positive for a controlled dangerous substance, and if so should he be removed from his State position?" However, after the hearing, the ALJ found that the chain-of-custody issue was an ancillary issue to his positive test result, concerning the randomness of the State's drug testing process. She found that answering the question of whether that process was a correct process that could be relied upon would then tell whether the appellant had indeed tested positive. In this regard, the ALJ asked if the chain of custody was sufficiently maintained to create a reasonable probability that the integrity of the appellant's urine specimen was not compromised. To reach this conclusion, the ALJ noted that Crespo failed to sign the appellant's Continuity of Evidence Form, "which automatically invalidates the [drug test] results unless there is sufficient evidence to reasonably suggest the sample tested did belong to the appealing officer." *See In re Lalama*, 343 *N.J. Super*. 560 (App. Div. 2001). The ALJ found no such "sufficient evidence." Specifically, she found several factors that make a reasonable probability questionable:

1. The specimen bottles are <u>not</u> the most secure vessels.[8]
2. Internal Affairs made "numerous unjustifiable errors," omitting dates and samples, improperly filing out logs and schedules, and <u>possibly</u> failing to transmit some samples to the Lab.[9]
3. Crespo was "wholly incredible."[10]
4. The appellant should have tested positive for Benzodiazepine, if he "were taking Xanax daily."[11]

The ALJ correctly found that the JJC "must prove that there is a 'reasonable probability' that the Appellant's sample remained unadulterated while in its custody, *though it need not negate every possibility of tampering*" (emphasis added), relying on *In re Lalama, supra* at 565-566. However, the ALJ concluded that the JJC had failed to satisfy her that a reasonable probability did not exist, finding "enough errors and inconsistencies exist to cast serious doubt on Internal Affairs' diligence in tracking and securing the specimens they collect." Based on her determinations that Crespo was not credible, that the specimen bottles could easily be substituted, and that the appellant should have tested positive for Benzodiazepine if he took Xanax

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[8] This has been refuted by Dr. Havier.

[9] This last conclusion is mere conjecture and has no basis in evidence from the record or hearing testimony.

[10] The ALJ reached this conclusion because of "certain behaviors he exhibited," namely, blushing, body shifts, and shoulder drooping.

[11] This is unsubstantiated from the appellant's testimony, who admitted, "Xanax is not a medication that you take daily. I take it to take the edge off my blood pressure. It is not really a medication for [high] blood pressure. It is just a nerve relaxer. When I felt stressed, I took it."

daily, the ALJ concluded that the appellant's drug specimen was "very suspect."

In its exceptions to the ALJ's initial decision, the JJC argues that the ALJ disregarded credible testimony in the record and misinterpreted key evidence, and that her identified "errors" regarding other samples did not affect the validity of the appellant's sample. After a thorough review of the record in the instant matter, including the testimony at the hearing, the Board finds the arguments raised by the JJC compelling.

CONCLUSION

After its *de novo* review of the record, including the testimony of the witnesses, the Board disagrees with the ALJ's determination of the credibility of the witnesses and finds that the appointing authority has proven the charges by a preponderance of the evidence. The Board acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id*. at 659 (citing *Locurto, supra*). The Board appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Board has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence. With regard to the standard for overturning an ALJ's credibility determination, *N.J.S.A.* 52:14B-10(c) provides, in part, that:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious, or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also N.J.A.C. 1:1-18.6(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). The Board finds that in this case, this strict standard has been met.

In the instant matter, the Board determines that the ALJ's findings of fact were unreasonable and contrary to credible evidence supporting the appellant's version of events. Therefore, based on its review of the testimony and the entire record, the Board makes the following findings:

1. Substantial credible evidence in the record establishes that the chain of custody for the appellant's specimen was maintained.

2. The ALJ's determination that the specimen bottles are "not the most secure" containers is not supported by the record and contrary to the JJC's policy and the Attorney General's Guidelines.

3. The ALJ improperly considered irrelevant Internal Affairs work schedules in concluding that the chain of custody for appellant's specimen was not intact.

4. The ALJ made unfounded credibility determinations with respect to both Chief Crespo and Investigator Cloud.

5. It is incontrovertible that the appellant's specimen tested positive for Cannabinoids.

In determining these facts, the Board reverses the ALJ's credibility findings and concludes that the ALJ's credibility determinations in this matter were unreasonable and not supported by the credible evidence in the record. As such, the Board finds Crespo's testimony credible and the appellant's testimony not credible. Crespo's testimony, regarding the chain of custody of the appellant's sample, does not demonstrate that the integrity of his sample was compromised. *See In re Lalama, supra.* Additionally, the ALJ erroneously concluded that the JJC improperly sealed the appellant's sample. Further, Dr. Havier's testimony conclusively refutes the appellant's claims of a possible false positive result. In light of the above findings, the Board disagrees with the ALJ's conclusion that the charges should be reversed. Rather, the Board finds that the appointing authority has proven the charges by a preponderance of the evidence, and the disciplinary charges against the appellant should be upheld.

With regard to the penalty, the Board recognizes the importance of maintaining a drug-free work force, particularly where, as here, the appellant is employed as a sworn law enforcement officer. It is clear that drug usage cannot be tolerated in a law enforcement officer. In imposing a penalty, the Board, in addition to considering the seriousness of the underlying incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). In this case, a review of the appellant's past disciplinary history is unnecessary since it is clear that removal is the proper penalty based on the egregious nature of the offense and the fact that the appellant, as a law enforcement officer, is held to a higher standard than other public employees.

See Moorestown v. Armstrong, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also In re Phillips,* 117 *N.J.* 567 (1990). Accordingly, the Board concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Merit System Board finds that the action of the appointing authority in removing the appellant was justified. Accordingly, the Board affirms that action and dismisses the appellant's appeal.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.